No. 8352

United States Circuit Court of Appeals

For the Ninth Circuit

MRS. AH FOOK CHANG, alias KAM YUEN and ROBERT CHANG, alias YUK MOON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS

On Appeal From the United States District Court for the Territory of Hawaii.

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I.

STATEMENT OF THE CASE.

Mrs. Ah Fook Chang and her son, Robert Chang, were indicted by the Grand Jury on January 17, 1936, on a charge of violating the Act of February 9, 1909, as amended (The Narcotics Drugs, Import and Export Act) and the Act of December 17, 1914, as amended (The Harrison Narcotic Act) (R. p. 4). They were

thereafter tried in the United States District Court and convicted (R. pp. 7-8) from which conviction they appeal (R. p. 40).

Defendants reside on the island of Maui (R. pp. 10; 15). On January 20th, they were arraigned (R. p. 24) and thereafter and prior to plea (R. p. 25) Robert Chang filed a motion to suppress the evidence, i. e., smoking opium, obtained in the search of his room on December 18, 1935 (R. pp. 45-46). The motion charged that officers of the United States and Peace Officers of the County of Hawaii had searched his private room without a search warrant or other legal authority (R. pp. 46-47). Issue was joined on this motion; the search was admitted but the familiar claim was made that it was a permissive search (R. pp. 48-49). Robert Chang testified in support of the motion that he was twenty-four years old, born on the island of Maui and had had three years of schooling; that he had spent years of his youth in China and returned here at the age of eighteen and entered school, third grade (R. p. 51). He testified that he arrived in Hilo December 18, 1935, at about 7 o'clock A. M., and on his arrival there immediately went to the Maunakea Rooming House in that town and engaged a room for himself. He left a suitcase in his room and walked around the town (R. p. 52). When it was getting dark, about 7 o'clock in the evening, he was crossing the street, walking away from the rooming house (R. p. 52), when three officers called to him:

"A. * * * and they yelled out to me and asked me 'Come here, boy', and they said they wanted to search my room.

Q. Did they tell you they were officers?

A. Yes sir, they said they were officers, and they shove me by the steps, they said they want to search my room, and I walk up; they tell me walk up first, and I went up to the room, and they told me, 'What room you stay?'; I said, 'Ten'; they said, 'Open the door'; and I scared, and I open the door; they ask me 'Open the suitcase', and I open the suitcase.

* * * * * * *

Q. And did you open the suitcase?

A. Yes sir; I was scared, I open the suitcase and they say I am under arrest." (R. p. 53)

The suitcase contained tins of smoking opium.

"Q. Why was it that you let them in your room like that?

A. They shove me to the steps and they say they are police officers.

Q. And you felt you had to do that?

A. Yes sir." (R. p. 54)

The government did not deny that Robert Chang's room was searched without a warrant, but claimed it was permissive. Lee A. Pearson, a Federal Investigator at Hilo, who participated in the search, testified that he, in company with Hilo police officers, stopped Robert Chang and told him they wanted to see him and, after one officer displayed his badge, said they wanted to search his room; that the defendant had said "O.K., come on up", and permitted them to enter and search his room (R. p. 62).

On cross examination, the defendant wished to show that the police and federal investigators had been working on the case since 5 o'clock in the afternoon; that they had shadowed Robert Chang and his mother about Hilo and that at 7 o'clock, when the officers thought the moment auspicious, *they approached Robert Chang and demanded of him permission to search his room* (R. p. 65). But the court refused to permit this proof. The record on this point speaks for itself.

> "Q. As I understand, the facts are these; that about 5 o'clock in the evening of the day in question you and Pacheco and Takemoto of the Hilo Police began an investigation of this matter?
>
> Mr. Moore: I object, may it please the court, to any investigation; we're talking about this search——
>
> Mr. Botts: This investigation would show, Your Honor, what they did; that's what it's intended to bring out.
>
> Mr. Moore: We're showing what's just before and during the search, Your Honor; we're not on a fishing expedition.
>
> Mr. Botts: There's no fishing expedition, by any manner, shape or means.
>
> The Court: We can't try the main case now.
>
> Mr. Botts: I'm not attempting to; it's just the search and the immediate steps leading up to the search.
>
> The Court: Your witness has testified, and so has this witness, that at 7 o'clock they went to this place.
>
> Mr. Botts: Yes. Now we're going to show that they began their details on this case at 5 o'clock and followed the last witness Robert

Chang and his mother to different places in Hilo, and it ultimately culminated in their apprehending Chang and gaining entrance to his room.

The Court: But, assuming they had followed him from the time he left there at 7 o'clock in the morning, as he testified he did, how would that throw any light on the facts surrounding this immediate search?

Mr. Botts: It's very material, if Your Honor please——

The Court: The Court doesn't see it.

Mr. Botts: If these investigators were investigating, as I am prepared to show they were in this case, there were certain things that properly should have been done. Now we offer to prove by this witness that he, with the officers I have named, Antone Pacheco and Takemoto, at 5 o'clock on the evening in question were detailed to this case; they saw Robert Chang's mother and Robert Chang himself coming out of the Hawaii Meat Market on Kamehameha Avenue and get on a bus and go down to Kress store on Kamehameha Avenue—that's about 1,000 feet from where they got on; these officers followed Mrs. Chang and her son in another machine; he will testify that as they approached the Kress store Mrs. Chang, with a baby in her arms, and Robert got off the machine and walked toward the Hilo Electric building, and these officers followed them. They shadowed their movements, in other words, from 5 o'clock to 7 o'clock and then, at the moment they thought auspicious, *approached Robert Chang and demanded of him permission to search his room.*

Mr. Moore: We object, may it please the court; it's nothing to do with the request for permission to search the room.

The Court: Yes, the Court doesn't see the materiality of what happened prior to the time they contacted this defendant.

Mr. Botts: Will Your Honor consider that as an offer or proof?

The Court: It may so be considered.

Mr. Botts: And will Your Honor rule on it?

The Court: Yes. The offer is not admitted." (R. pp. 63-65)

Again, when the government called its second witness, K. Takemoto, a Hilo police officer who took part in the search, (R. p. 66), the defendant with renewed insistence demanded the right to show the circumstances leading up to this search to throw light on, first, the question of its voluntary character, and second, that under the circumstances, it was the duty of the officers to have obtained a search warrant. Again, it will be necessary to quote from the record with Officer Takemoto on the stand.

"Q. What was the first time, during the day that you saw either Robert Chang or his mother?

Mr. Moore: I object to this, may it please the Court, as this is an attempt on behalf of counsel to get what the offer of proof just made that was denied. We're talking about 7 o'clock here.

Mr. Botts: We have a right to go into the antecedents of this search.

The Court: You are, if it pertains to the search; but if it's a fishing expedition on your main case you're not.

Mr. Botts: We're not concerned with the main case; we're concerned here, Your Honor, with whether they had reasonable cause to apply for a search warrant. I expect to show by this witness that they had this boy under serveillance for two hours, and I offer to show that.

Mr. Moore: Then, may it please the Court, it is not proper for counsel to show or make out a case on cross-examination. I have no objection to him cross-examining this man to his heart's content about this search, but to go in and say he makes an offer of proof to show this, that and the other—let him put him on as his witness, and not on cross-examination.

Mr. Botts: We're not, Your Honor. They don't ordinarily stop a man on the street and say 'We want to search your room' unless there's some cause for it. Now, he says they apparently stopped this man in the lawful exercise of his right crossing the street at 7 o'clock in the evening. I submit to Your Honor that under the circumstances revealed by this direct examination we have an absolute right to inquire into the history of this situation, the matters that led up to the stopping of this man on the street; and I except to Your Honor's ruling.

Mr. Moore: May it please the Court, this man has brought a motion to suppress the evidence here, and he has set forth, so far as this witness is concerned, for which offer he closed his case, that this boy was intimidated or forced against

his will to open this door, and we're rebutting that by our answer here and putting on proof. To go around in circles here on something he says he's going to prove, that if he was going to prove anything like that the time for him to prove it is on his case in chief and call his witnesses for it. To come in here and attempt to drag in on cross-examination things that have nothing to do with this particular search, under a guise of cross-examination, we submit is absolutely improper and we object to it.

The Court: It seems to the Court that the issue in this motion is narrowed to very definite limits. The petition itself sets out that the search was unlawful in that this man's private room was invaded without a search warrant or lawful authority. In answer the Government sets up that the search was made with the consent of the defendant—consent voluntarily given; and that is traversed by the traverse filed by the defendant, which alleges, as the Court now recalls it, that the search was not acquiesced in by him, but virtually that he was coerced into permitting the search; in other words, that he was compelled by the officers to submit to this search. Any evidence bearing upon that question will be gladly received.

Mr. Moore: To which we have no objections whatsoever.

Mr. Botts: We offer to prove, if Your Honor pleases, by this witness that, on or about 5 o'clock in the afternoon of the day in question, this witness and his associates, the officers had information that reasonably led them to believe that this defendant Robert Chang had opium in his pos-

session secreted in the room in the Maunakea boarding house; that they were acting upon this information which reasonably tended to establish that as a matter of law, and that they followed these defendants for two hours, from 5 o'clock in the afternoon until 7 o'clock, when they finally stopped Robert Chang. And what happened after that has been related in the evidence.

Mr. Moore: We object to the offer as being incompetent, irrelevant and immaterial, and as having no bearing upon the issues of this case, on the matter now before the Court.

The Court: In view of the Court, an officer might keep a suspected person under surveillance on mere suspicion but he could not possibly apply for a search warrant on that suspicion.

Mr. Botts: I wasn't dealing with suspicion, Your Honor; I was dealing with reasonable cause to believe, as a legal proposition, that these people had opium—that this man had opium: not mere suspicion, they had definite facts. Will Your Honor rule on the offer?

The Court: *Yes. The evidence will not be admitted.*

(Exception No. 2). To which said ruling of the Court, the defendant duly excepted and his exception was duly allowed." (R. pp. 67-71)

The motion to suppress was denied (R. p. 26).

Before the trial the defendant, Mrs. Ah Fook Chang, filed a motion to suppress a purported confession obtained from her on December 19th (R. p. 72). In this motion Mrs. Chang set forth that her son, Robert, was

arrested on December 18th in connection with the seizure of certain smoking opium and that she was arrested and placed in custody on the same day. Paragraph III of her motion reads as follows:

> "That the movant was taken in custody at approximately 7 o'clock P. M. of said 18th day of December, 1935, and, without warrant or process of any kind, she was held a prisoner by Federal officers and peace officers of Hilo until approximately 9 o'clock A. M. of December 20th, 1935, a period of thirty-eight hours, when she was brought before the United States Commissioner at said Hilo and charged. That movant was taken to jail with her child, an infant in arms whom she is nursing. That on or about 2 o'clock P. M. on the following day, i. e., December 19th, 1935, notwithstanding that she had not been brought before the United States Commissioner or other magistrate to be charged, she, with her infant child, was conducted into a room or office and there subjected to a tortuous examination by Federal officers and peace officers of Hilo, in the course of which she was repeatedly informed that the inquisition would not cease, and she would not be permitted to rest with her baby, unless she signed a paper writing purporting to be a confession of her claimed complicity in connection with the opium seized from the said Robert Chang, alias Yuk Moon. That the interrogation continued throughout the entire afternoon and evening of said 19th day of December, 1935, when finally, at approximately midnight on said day, movant, completely exhausted by the ordeal and in great

distress and apprehension over her plight and the condition of her child, affixed her signature to said paper writing to put an end to the torture of further accusatory proceedings by said officers. That during the afternoon and evening of said 19th day of December, 1935, movant had been wholly unable to take food of any kind because of her suffering and her mental condition of worry and fear, occasioned by the conduct of said Federal and peace officers aforesaid, and in consequence thereof, she was unable to nurse her child, her breasts being without the customary milk and the child, hungry and distressed and almost constantly crying in its plea for nourishment, caused movant frantically and without thought of self, to accede to the demands of said officers and to sign the paper writing desired by them. That movant is a person of the Chinese race with only a meager education and with only an imperfect understanding of the English language.

"That movant is informed and believes and alleges the fact to be that upon her trial in the above entitled matter the government intends to offer said paper writing in evidence and movant makes this motion in advance of trial for the suppression of said paper writing on the ground that the same was obtained from her illegally and improperly and in violation of her constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States of America." (R. pp. 73-75)

The government admitted the existence of the confession and its intended use but denied that it had been taken from her involuntarily (R. pp. 76-79). Mrs. Chang took the witness stand in support of this motion (R. p. 80) and testified that she was forty-five years old, practically illiterate (R. p. 81); she is the mother of six children and lives in Wailuku, Maui (R. p. 81). She testified that she and her son, Robert, arrived in Hilo on the *S. S. Waialeale* or *S. S. Hualalai* on December 18, 1935 (R. p. 81), and at 7 o'clock that evening while she was "in one store drinking soda water with my baby", she was arrested. She said a Portuguese man came in, presumably an officer, told her "Come here"; that she was very frightened and stood up, holding her baby. Said he grabbed her hand and pulled her across the street where they met another officer and they took her to Robert Chang's room in the Maunakea Rooming House, a place she had never been before (R. p. 81). Robert Chang was there and they took them to jail, including the woman's infant. She remained in jail all night without being questioned or charged. They gave her a little pork and rice and some kind of fish the next morning but she couldn't eat very much.

> "Q. Why not?
> A. Because I worry about my baby, I couldn't sleep that night, ——" (R. p. 82)

She remained in jail without being charged or brought before the Commissioner or allowed bail. The welfare of her infant, in jail with her, distressed her greatly

(R. p. 83). At 2 o'clock in the afternoon, the day following her arrest, they took her from jail to the Police Station where they put her in a room, probably in the room with the desk sergeant (R. p. 83). She hadn't seen Robert Chang since his arrest or talked to him (R. p. 83). She testified that during her first night of imprisonment, she asked for use of a telephone that she might notify her family on Maui of her plight, but permission to use the phone was denied her (R. p. 83). She remained at the Police Station, uncharged and uninterrogated, until about 7 o'clock in the evening, twenty-four hours after her arrest. She said they offered to take her back to the "calaboose house" for dinner, but she didn't want to eat "because I am worry my baby". Finally they took her in the next room where there were four or five policemen and they questioned her (R. p. 84). She said she didn't know which officer questioned her. She said:

> "A. I don't know which one ask me, I cannot remember which one ask me, because this one ask me, and this one ask me,—I don't know.
>
> Q. They were all asking you questions?
>
> A. Yes; they didn't give me chance; I was so worried about my baby, I was so worried about my baby.
>
> Q. Four or five of them kept asking questions?
>
> A. Yes." (R. p. 85)

The questions concerned her knowledge of the opium which had been found and seized in Robert Chang's room in the Maunakea Rooming House. She said she

denied she knew anything about this opium for a long time and they continued questioning her in a loud voice.

> "Q. What did they say to you?
> A. They ask me if I know this, and I said I don't know; they said, 'You know, you have to tell, otherwise you stay in jail'; and I said, 'I want to telephone'; they said, 'No, no, you have to tell everything, then you can go outside, otherwise we won't let you telephone, we won't let you go to sleep.'" (R. p. 85)

> "Q. Did they say anything about your boy?
> A. They said if I tell then easy for my boy and easy for me to go out; and I ask them if I can go up that night sleep with my baby some place; they said, 'Sure, if you tell I let you go telephone'; I said, 'I want to telephone to my husband, nobody knows where I am, you see'." (R. p. 86)

So at last, with assurance that she could telephone her husband if she signed the paper, sometime between eleven o'clock and midnight, between twenty-eight or twenty-nine hours after she was put in jail with her infant, she signed a confession. She said, finally being asked if she did sign the confession:

> "A. Yes, because I worry I cannot get out with my baby; I didn't eat no food that evening and my baby get no more milk to drink, I worried about my baby; he said, 'We let you go out if you sign the paper, it's easier for you'." (R. pp. 86-87)

But though she signed the paper she was not charged nor given an opportunity to make bail but was taken back to jail where she and the baby spent another night. Finally, the next morning, she was taken to the United States Commissioner (R. p. 125) and charged. She knew her son had signed a paper but she did not know what it contained (R. p. 87). Referring to her paper, she said she wouldn't have signed it had she not been worn out from lack of sleep and holding her baby in her arms all night, which was cold and rainy (R. p. 88). She said she was in a frame of mind where she would do anything.

> "Q. Finally, on the second day, when your baby was cold and sick, you signed the paper?
>
> A. Yes, for my baby's sake I do anything, because my baby never have enough breast that Wednesday night and Thursday." (R. p. 88).

The woman's testimony and many of its details were corroborated by her son, Robert Chang (R. pp. 95-98).

The government opposed the motion and called to the witness stand officers who had part in obtaining the woman's confession (R. pp. 99-116). In the course of this phase of the hearing it became important to cross-examine these witnesses with some detail. Several statements had been taken from the woman defendant (R. p. 15) in only the last one of which did she admit complicity in the opium transaction (R. p. 116). Counsel for defendant called for the production of the purported confession to aid in the cross-examination of the witnesses and in this regard the following proceedings were had:

"Q. Mr. Wells, have you that statement that she signed?

Mr. Moore: I have that statement in my file.

Mr. Botts: I ask counsel to produce it, Your Honor.

Mr. Moore: I feel, Your Honor, that I'm not called upon to produce it.

The Court: The Court is not concerned with what's in the statement, but how it was obtained.

Mr. Botts: We submit that upon proceedings pertaining to a confession we're entitled to have the instrument itself produced in court for inspection not only for the court but for the defendant himself and his counsel.

The Court: That would be true when the statement is offered, but not prior to that. This is not a fishing expedition.

Mr. Botts: It's not a case of a fishing expedition.

The Court: Well, it looks very much like it when you ask to see the statement.

Mr. Botts: There's a specific statement alleged to have been taken from this witness, and we submit at this time on proceedings in advance of trial we're entitled to the production of that statement in court.

The Court: The Court's view of that differs from that diametrically.

Mr. Botts: Your Honor refuses to compel the production?

The Court: Yes, that's the effect of the ruling.

Mr. Botts: Exception.

The Court: Let the exception be noted." (R. pp. 113-114)

The government denied the confessions were obtained by threats or promises, but did not deny that defendants had been kept in jail for thirty-eight hours without charge, though a United States Commissioner maintained an office in the Police Department and that his office was only "about four long blocks from where she was arrested" (R. pp. 102-103).

The motion to suppress the confession was denied over defendant's exception (R. p. 117).

Thereafter a jury was empaneled and defendants put to trial jointly. When evidence was offered relating to the search and seizure in the Maunakea Rooming House, defendant renewed his objection to this evidence on the ground that the search and seizure were illegal, the objection was overruled and it was understood that all such testimony would be admitted subject to defendant's objection and exception (R. pp. 118-119).

On the trial it developed that the police officers first saw Robert Chang at 5 o'clock in the afternoon of December 18th on Kamehameha Avenue. The officers shadowed him under direction of George Richardson, Inspector of Police of South Hilo. Mr. Richardson informed the officers that defendant, Robert Chang, had opium in his room in the Maunakea Rooming House and after following him for about two hours, they took a position near the rooming house where they could contact him when he came out (R. pp. 120-121). When he was crossing the street, the officers approached him and told him that they were police officers and they wanted to search his room and he

said "O.K." (R. p. 118). The officers accompanied him to his room where they found the opium in a suitcase (R. p. 119). Officer Pacheco, after finding the opium, left the rooming house and "picked up" Mrs. Ah Fook Chang (R. p. 134) and took her to room 10 in the Maunakea Rooming House. Remaining there a few minutes, the officers took the woman and her son to the Hilo Police Station where the two defendants were booked (R. p. 134). The defendants were kept in jail without questioning or charge until the afternoon of the next day when William K. Wells, narcotic agent, arrived from Honolulu (R. p. 136). He proceeded to question the defendants, first the boy and then the woman and this continued until around midnight that night, by which time the confessions had been obtained from both defendants. [Robert Chang's confession (R. pp. 9-13); Mrs. Ah Fook Chang's confession (R. pp. 148-151).] These confessions were admitted in evidence over defendants' objection and exception, the objection being that they were obtained while under illegal restraint and were not free and voluntary.

Following the admission of these statements, counsel for defendants asked the court to instruct the jury, in effect, that the confession of one defendant could not be considered as evidence against the other. We quote from the record:

> "The statement having been admitted in evidence, the following proceedings were had:
>
> Mr. Botts: I now ask Your Honor to instruct the jury that any statements made in this statement Exhibit 'B' in which Robert Chang's name

appears in an incriminating way, that the jury be instructed that it is not evidence in any manner, shape, or form against Robert Chang and can only be considered as against Mrs. Ah Fook Chang, and that the weight of this statement, that is, what value if any the jury wants to place upon it, is solely within the purview of the exclusive power of the jury.

Mr. Moore: *We have no objections to the jury being so instructed, for the reason that with this particular statement there is no evidence that Robert Chang was asked whether or not this statement was correct.* It appears with reference to the other statement that after it was completed and read to the defendant Robert Chang, the defendant Mrs. Ah Fook Chang was asked whether or not that statement, which is United States Exhibit 'A', was correct, and she stated that it was to that as to this particular statement we have no objections to the jury being instructed that, insofar as the defendant Robert Chang is concerned, it cannot be considered as against him.

The Court: Before ruling on this matter I'd like to ask the witness a question.

Q. At the time this statement was read to Mrs. Ah Fook Chang was Robert Chang present?

A. Yes sir.

Q. He heard the statement read to her?

A. He was sitting in the room on my right; Mrs. Ah Fook Chang was on the left of the table.

The Court: It appearing that this statement was made in the presence of the defendant Robert Chang, the instruction will not be given.

Mr. Botts: Exception, if Your Honor pleases.

The Court: Exception noted." (R. pp. 151-153)

At other times during the trial, as will be shown, counsel for defendants made renewed efforts to restrict the confession as evidence to the party making it but without success (R. p. 182). Following the admission in evidence of these confessions, the prosecution put in evidence, over the objection and exception of defendants, the opium and other articles seized in room 10 of the Maunakea Rooming House. When these articles were admitted, counsel for defendants asked that the sworn testimony of Mrs. Ah Fook Chang and Robert Chang, given in court in connection with the hearing on the motion to suppress, be read to the jury by the court reporter, but this motion was denied over defendants' exception (R. pp. 158-162).

The court refused to give nine instructions requested by defendants (R. pp. 174-181). These instructions all centered around the confessions obtained from the defendants and they will be discussed with some detail in the latter part of this brief.

The jury retired and after some hours and while counsel for the prosecution and defendants were chatting with the trial judge in his chambers, the foreman of the jury unexpectedly appeared, entering the chambers through a side door usually used by the judge in going to and from the courtroom. The proceeding which followed occurred in the chambers of the judge with only the foreman, counsel and the judge present. The foreman stated the jury wished to be informed if a confession of one defendant in the case could be used as evidence against the other. Counsel urged the court to instruct the jury in the negative,

that is, that a confession of one defendant could not be used as evidence against the other, but the court refused to do this and adhered to its original ruling and instructed the foreman that a confession made by one defendant in this case could be considered as evidence against the other (R. p. 182). The foreman retired and shortly thereafter a verdict was returned against both defendants (R. pp. 7-8).

II.

SPECIFICATIONS OF ERRORS RELIED ON.

The assignment of errors (R. pp. 34-40) contains twenty-one specifications of errors but for the purposes of this brief it will only be necessary to discuss eighteen of them.

ASSIGNMENT No. 1.

> That the Court erred in overruling and denying the motion of Robert Chang, alias Yuk Moon, one of the defendants herein, to suppress the evidence obtained as a result of the search and seizure on December 18, 1935, when Hilo Police Officers accompanied by a Federal Officer entered his room in the Maunakea Rooming House and searched the same under the pretended authority of his consent to such search, no such consent, as a matter of law, having been given or received.

ASSIGNMENT No. 2.

> That upon a hearing of the motion to suppress the evidence obtained as a result of the search and seizure referred to in the preceding assign-

ment, the defendant offered to prove that the officers searching said room had reasonable grounds to obtain and could reasonably have obtained a search warrant to authorize the said search and the Court erred in refusing said offer and denying defendant an opportunity to make said proof.

In this connection, defendant offered to prove (R. p. 70) that the officers had watched defendant for about two hours; that they had definite facts upon which they could reasonably have obtained a search warrant but instead they approached defendant and demanded permission to search his room (R. p. 65).

ASSIGNMENT No. 3.

That the defendant, Mrs. Ah Fook Chang alias Kam Yuen, petitioned the Court for the suppression, or exclusion, from evidence of a purported confession claimed to have been obtained from her by Federal Narcotic Officers and Police Officers of the City of Hilo on December 19, 1935, illegally and improperly and in violation of her constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States, and the hearing on said petition having been duly held, the Court erred in denying the same and holding and deciding that said confession was a free and voluntary act of the said Mrs. Ah Fook Chang alias Kam Yuen.

ASSIGNMENT No. 4.

That in the course of the hearing on said motion to suppress said confession and while William K. Wells, Federal Narcotic Agent, was on the wit-

ness stand, he being the Federal Officer who had taken said confession, the said defendant, Mrs. Ah Fook Chang alias Kam Yuen, moved the Court to require the production of said confession for the purpose of inspection and for use in the further examination of the said witness and the Court erred in denying said confession at said time and for said purpose and in denying said defendant the right to examine the same.

ASSIGNMENT No. 5.

That on the trial of the above entitled cause, the Court erred in permitting, over the objection and exception of defendants, the introduction in evidence of the property and articles found and seized in connection with the search of the room premises of defendant, Robert Chang alias Yuk Moon, on the said 18th day of December, 1935.

ASSIGNMENT No. 6.

That the Court erred in admitting in evidence over the objection and exception of the defendants, the purported confession of Robert Chang admitted in evidence as U. S. Exhibit "A" on the ground that said purported confession was taken while said defendant was under illegal restraint and that the same was not a free and voluntary confession and was obtained as a result of an illegal search and seizure of his mind and memory while in unlawful confinement and by coercion.

ASSIGNMENT No. 7.

That the Court erred in denying the request of Mrs. Ah Fook Chang alias Kam Yuen that the Court instruct the jury that the statement or con-

fession of the said Robert Chang alias Yuk Moon (U. S. Exhibit "A") could only properly be considered as evidence against him and not as against her.

Assignment No. 8.

That the Court erred in admitting in evidence, over the objection and exception of the defendants, the purported confession of Mrs. Ah Fook Chang alias Kam Yuen admitted in evidence as U. S. Exhibit "B" on the ground that said purported confession was taken while said defendant was under illegal restraint and that the same was not a free and voluntary confession and was obtained as a result of an illegal search and seizure of her mind and memory and while in unlawful confinement and by coercion.

Assignment No. 9.

That the Court erred in denying the request of Robert Chang alias Yuk Moon that the Court instruct the jury that the statement or confession of the said Mrs. Ah Fook Chang alias Kam Yuen (U. S. Exhibit "B") could only properly be considered as evidence against her and not as against him.

Assignment No. 10.

That the plaintiff having rested, defendants offered in evidence the sworn testimony of the defendants given in connection with the motion presented by Mrs. Ah Fook Chang alias Kam Yuen to suppress the statement or confession

purported to have been made by her and the Court erred in denying said offer and refusing to allow the evidence to be read to or considered by the jury.

The proceedings with respect to this offer were substantially as follows:

The case for the prosecution was closed; the Court had admitted the confessions of the two defendants in evidence. A day or two before the trial, a hearing had been held before the judge on the motion to suppress Mrs. Ah Fook Chang's confession, in which hearing both defendants testified and were cross-examined by counsel for the government. Defendants moved that this sworn testimony be read by the court reporter to the jury (R. p. 158), which motion was denied.

Assignment No. 11.

That the Court erred in giving the Court's charge or instruction (No. 12-a) in that said instruction failed to define the meaning of the word "voluntary", as used in connection with the phrase "free and voluntary confession". Said instruction No. 12-a is as follows:

> You are instructed that there has been admitted in evidence in this case alleged confessions of each defendant, and that each of these confessions were alleged to have been made in the presence of each of the defendants.
>
> The Court instructs you that a confession of guilt should not be considered if it was not free

and voluntary but procured through influence or threats or the promise of favor, or other circumstances which might render it involuntary. But a free and voluntary confession is generally deserving of the highest credit because it is against the interest of the person making it and is presumed to flow from a sense of guilt.

You are further instructed that a confession of this character should be received with caution and defendants should not be convicted upon the evidence of such confessions alone, unless supported by other proof in the case.

ASSIGNMENT No. 12.

That the Court erred in refusing to give defendants' requested instruction number one as follows:

I instruct you, Gentlemen of the Jury, that there has been admitted in evidence what purports to be written confessions by the defendants herein.

In this connection, I instruct you that a confession, to be considered as evidence against a defendant in a criminal case, must be one freely and voluntarily made by such defendant. When we use the word "voluntary" in this connection, we mean that the confession must have been made of defendant's free will and accord, without coercion, promise or inducement or by the method known as sweating. The word "voluntary" essentially includes in its meaning the freedom of choice as well as the exercise of the defendant's will without constraint by any force or influence. If, in this case, you believe from the evidence and

the facts surrounding the incarceration of these defendants that either of the two purported confessions admitted in evidence herein was not voluntarily made, within the meaning of that word as defined in this instruction, or if you have a reasonable doubt on the point, you should totally disregard, in your deliberations, such confession.

ASSIGNMENT No. 13.

That the Court erred in refusing to give defendants' requested instruction number two, as follows:

> I instruct you, Gentlemen of the Jury, that in considering whether or not the confession made by Mrs. Ah Fook Chang was voluntarily made within the meaning of this term as heretofore defined in these instructions, it is your right and duty to take into consideration the period, circumstances and duration of her arrest, confinement and detention and the fact that she had, previously to the making of said confession, made at least two other statements in which she denied all guilt and complicity in the matters and things set forth in the final purported confession which was obtained from her, as well as all other facts and circumstances surrounding the taking and making of said alleged confession.

ASSIGNMENT No. 16.

That the Court erred in refusing to give defendants' requested instruction number six, as follows:

> The Court instructs the jury that it was the duty of the officers who arrested defendants in this case, to have brought them before the United

States Commissioner at Hilo, or local magistrate without unnecessary delay, that they might speedily be advised of the accusation against them and be permitted enlargement on bail.

I further instruct you, as a matter of law, that failure on the part of an arresting officer to bring an arrested person with reasonable dispatch before a commissioner or magistrate, for the purposes mentioned in this instruction, renders the detention and imprisonment of the arrested person unlawful.

ASSIGNMENT No. 17.

That the Court erred in refusing to give defendants' requested instruction number seven, as follows:

I further instruct you, Gentlemen of the Jury, that an arresting officer has no legal right to hold an accused in jail without charge, for the purposes of investigating the crime he is believed to have had a part in, or to procure a confession from him. Detention for such purpose or purposes is illegal.

ASSIGNMENT No. 18.

That the Court erred in refusing to give defendants' requested instruction number eight, as follows:

I further instruct you, Gentlemen of the Jury, that if you believe from the evidence that the defendants in this case were held in confinement without charge and without opportunity to make bail, for an unreasonable length of time, considering the availability of a United States Com-

missioner, then I instruct you as a matter of law their detention and imprisonment was improper and illegal.

ASSIGNMENT No. 20.

That the Court erred in refusing to give defendants' requested instruction number ten, as follows:

> And I further instruct you, Gentlemen of the Jury, that the detention and imprisonment of an accused, without charge and solely for the purpose of obtaining a confession from him, renders a confession thus obtained invalid and inadmissible againt him. A confession thus obtained is an invasion of defendant's rights under the Fourth, Fifth and Fourteenth Amendments of the Constitution. These Amendments shield and protect him, not only in the lawful enjoyment of his tangible possessions, but also in the possession of the secrets of his mind.

ASSIGNMENT No. 21.

That the Court erred in denying defendants' motion for a new trial on the grounds set forth in said motion, particularly with reference to Paragraphs IV to XII inclusive, being as follows:

IV.

> Error of the trial court in denying the motion of defendant, Robert Chang, alias Yuk Moon, for the suppression of the evidence obtained as a result of the search and seizure of defendant's room on December 18, 1935.

V.

Error of the trial court made on the hearing of said motion to suppress evidence obtained by said search and seizure, in denying defendant's offer of proof that the Federal and Police Officers making said search and seizure could reasonably have obtained, and had reasonable grounds for obtaining, a search warrant for said search and seizure, which offer of proof was denied by the Court over the exception of defendants.

VI.

That the trial court erred in denying the motion of the defendant, Mrs. Ah Fook Chang, alias Kam Yuen, for the suppression of a purported confession obtained from her by Federal Narcotic officers during the night of December 19, 1935.

VII.

That the trial court erred on the hearing of said motion to suppress said confession in denying defendant's motion to produce said confession for inspection and for use in connection with the examination of the witnesses called to testify with relation to said confession.

VIII.

That the trial court erred in admitting in evidence U. S. Exhibits A and B, being the purported confessions of the defendants herein.

IX.

That the trial court erred in refusing to instruct the jury, upon motion duly made by de-

fendants, that the purported confession of Robert Chang, alias Yuk Moon, could not be considered as evidence against Mrs. Ah Fook Chang, alias Kam Yuen.

X.

That the trial court erred in refusing to instruct the jury, upon motion duly made by defendants, that the purported confession of Mrs. Ah Fook Chang, alias Kam Yuen, could not be considered as evidence against Robert Chang, alias Yuk Moon.

XI.

That the trial court erred in admitting in evidence as exhibits the opium, suitcase, boxes and papers and other articles obtained as a result of the search and seizure of defendant's (Robert Chang's) room in the Mauna Kea Rooming House on said 18th day of December, 1935.

XII.

That the trial court erred in refusing to admit in evidence, upon the trial of the above entitled cause, the sworn testimony of defendants given in support of the motion of Mrs. Ah Fook Chang, alias Kam Yuen, for the suppression of her purported confession.

III.

ARGUMENT.

1. ILLEGAL SEARCH AND SEIZURE.

(a) Search made without warrant and without defendant, Robert Chang's, consent.

(b) Court erred in refusing offer of proof; that search warrant could reasonably have been obtained by the officers who demanded admission to his room to search same.

(a) It will be conceded that the search in this case was a federal search in the sense that the Fourth and Fifth Amendments and acts of Congress relating to searches and seizures are applicable. The search and seizure and arrests were participated in by federal officers (R. p. 62) and the proceedings were regarded as federal (R. pp. 128-129). *(Byers v. U. S.,* 273 U. S. 28).

The police officers testified they approached Robert Chang, displayed their badges, said they wished to search his room; he said "O. K.", opened the door of his room and permitted them to search. This act of obedience on his part, a densely ignorant boy (R. p. 156) and a stranger in a strange town, is relied upon by the Government as a voluntary waiver of his Constitutional right. Obviously, what he did was to bow in submission to a situation too strong for him to resist. At most, he merely suffered a search to be made. In no legal sense did he waive his Constitutional right. Officers very glibly testify about asking "permission" and getting "consent" to search without warrant. They reel off the formula with the

monotony of a court clerk swearing a witness. In nine cases out of ten, it is not consent they are getting but obedience or submission. And that was what they got here. Their story of getting permission, colorless and flaccid, is strikingly in contrast to the vivid picture sketched by the illiterate defendant in a few words of broken English.

> "Q. Did they tell you they were officers?
> A. Yes sir, they said they were officers, and they shove me by the steps, they said they want to search my room, and I walk up; they tell me walk up first, and I went up to the room, and they told me, 'What room you stay?' I said, 'Ten'; they said 'Open the door'; and I scared and I open the door; they ask me 'Open the suitcase', and I open the suitcase." (R. p. 53)

This, we submit, has the salty twang of truth.

Of course a defendant may waive constitutional rights, including rights under the Fourth Amendment. See *U. S. v. Patton,* 281 U. S. 276, 74 L. ed. 834, 50 Sup. Ct. 253; *Huhman v. U. S.,* (C.C.A. 8) 42 Fed(2d) 733; *Contrell v. U. S.,* (C.C.A. 5) 15 Fed(2d) 953. But the evidence must clearly show consent was really voluntary and with a desire to invite search, and not merely to avoid resistance. (*Herter v. U. S.,* (C.C.A. 9) 27 Fed.(2d) 521; *Farris et al. v. U. S.,* (C.C.A. 9) 24 Fed.(2d) 639; also *U. S. v. Lydecker,* (D.C.) 275 Fed. 976; *U. S. v. Kelih,* 272 Fed. 484; *U. S. v. Rembert,* 284 Fed. 996.)

In order for assent to a search to be construed as consent, such assent must have been given without the

inducement of coercion, duress, fraud or overreaching of any kind. In *Gould v. U. S.,* 255 U. S. 298, where papers were taken under the guise of a social call, it was said:

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights."

See also *U. S. v. Baldocci,* 42 Fed.(2d) 567; *U. S. v. Rembert,* supra; *Farris v. U. S.,* supra; *Slusser v. U. S.,* (D. C.) 270 Fed. 818; *Amos v. U. S.,* 255 U. S. 313; *Cofer v. U. S.,* (C.C.A. 5) 37 Fed.(2d) 677; *Territory v. Ho Me,* 26 Haw. 331; *U. S. v. Kozan,* 37 Fed. (2d) 415; *U. S. v. Marra,* 40 Fed.(2d) 271; *U. S. v. Shultz,* 3 Fed. Sup. 273; *U. S. v. Lee,* (C.C.A. 2) 83 Fed.(2d) 195; *Brown v. U. S.,* (C.C.A. 3) 83 Fed.(2d) 383; *Ray v. U. S.,* (C.C.A. 5) 84 Fed.(2d) 654.

Many times it has been emphasized by the court that mere *assent* to the request of officers to search is not *consent* (*Amos v. U. S.*, supra).

In *Farris v. U. S.*, supra, this court passed upon the question of whether the federal agents had obtained consent to search dwelling of defendant. Federal agents came to defendant's premises, disclosed their identity, said they had come to look over and search the house. Defendant replied, in effect, "All right, you will find nothing here now". Considering whether or not the defendant had waived his constitutional rights, this court said:

> "* * * we are far from convinced that the consent upon which they rely was sufficient to authorize a search, which was otherwise clearly prohibited by law."

Certiorari denied: (277 U. S. 677).

(b) Error of court in refusing offer of proof.

1. *That search warrant could have been easily obtained.*
2. *That the officers* DEMANDED *admission to Robert Chang's room to search same, notwithstanding they had no warrant.*

Defendant, Robert Chang, offered to prove that the arresting officers had *demanded* that he admit them to his room for the purpose of search (R. pp. 65; 67-70), and also that the officers were in possession of sufficient facts to entitle them to a search warrant had they applied for one. The court denied these offers (R. p. 71). It is difficult to understand how such

offers could be denied, for in the first place, if the officers *demanded* admission to defendant's room, their entry was not permissive. Obedience to a demand of an officer is not acquiescence but submission; and, of course, if the officers could reasonably have obtained a search warrant, it was their duty to have done so.

> "In cases where securing a warrant is reasonably practical, it must be used."
>
> *Carroll v. U. S.,* 267 U. S. 132.

> "* * * the agent had made no effort to obtain a warrant for making a search. They had abundant opportunity to do so and to proceed in an orderly way * * * there was no probability of material change in the situation during the time necessary to secure such warrant."
>
> *Taylor v. U. S.,* 286 U. S. 1, 52 Sup. Ct. 466.

In *Agnello v. U. S.,* 269 U. S. 20, 46 Sup. Ct. 4, the court said that the search of a man's home without a search warrant was illegal and abhorrent to the law, no matter how certain the officers were that it contained incriminating evidence; and in *U S. v. Marra,* 40 Fed.(2d) 271, the court said:

> "In this case, under the facts as they were developed at the hearing before the Commissioner, the prohibition officers could readily have obtained a search warrant for these premises. This is what they should have done instead of searching without a warrant." (Citing cases.)

We submit that the court erred in denying these offers of proof.

2. THE PURPORTED CONFESSION OF MRS. AH FOOK CHANG.

The statutes require that a defendant arrested upon a criminal charge shall be brought before "the nearest United States Commissioner" for the taking of bail (*Title 18, U. S. C.,* Sec. 595). This statute means that he be forthwith taken before the Commissioner and any delay, even a slight delay, is wrongful (*Von Arx v. Shafer,* (C.C.A. 9) 241 Fed. 649).

In the hearing before the trial judge on the motion to suppress the confession of Mrs. Ah Fook Chang, it was disclosed that the United States Commissioner maintained an office within a few feet of where the woman and her boy were kept prisoners and within four blocks of where they were arrested. (R. pp. 102-103). The purpose of this evidence was to show that it would have been a simple matter to have brought defendants before the Commissioner, charged and admitted them to bail. This was not done, but on the contrary, they were held for a period of thirty-eight hours under circumstances which are best expressed in the record itself (R. pp. 80-95).

They were deliberately held in jail to wring a confession from them (R. p. 160). It is the duty of the court to consider the real purpose behind their confinement "with an eye to detect and a hand to prevent" encroachment on their constitutional rights (*Byors v. U. S.,* 273 U. S. 28, 47 Sup. Ct. 248). For police officers to say, under the facts here revealed, that no "threats or force" was used is senseless. The force of prolonged lawless imprisonment and threat of further indefinite imprisonment, not only for de-

fendants themselves but for a hapless infant, were used by these officers, whose conception of "force" or "threats" is restricted to applications of a night-stick.

There is a touch of satire in the declaration of these officers of their delicate feeling over the constitutional rights of these defendants—rights which they flaunted in a high-handed, insolent way—the right of these defendants to be promptly charged, to be allowed bail and the advice of counsel, no less than the right of protection against involuntary self-incrimination. In a small town distant from Honolulu, they were engaged in a cold-blooded undertaking to compel the defendants to confess and to that end, they trod rough-shod over the Fourth, Fifth and Fourteenth Amendments. And now, when they cannot deny defendants were illegally imprisoned, their justification for the denial of one constitutional right is found in their violation of another.

3. DEMAND FOR PRODUCTION OF CONFESSION.

In the motion which Mrs. Ah Fook Chang filed in advance of trial for the suppression of her confession, she desired to examine Narcotic Agent Wells, who took the confession, with respect to it and while the agent was on the witness stand, asked for its production, which the court refused over the exception of defendant, branding the request as a fishing expedition (R. p. 113). It is almost incredible that a court could thus lightly dispose of a matter of such vital importance to a defendant. Search has failed to reveal any similar denial in a reparted case. On the simple authority of logic and fair deal-

ing, when defendant, in good faith and in advance of trial, and in the absence of the jury, challenges the legality of a purported confession, the thing challenged should be produced in court for the inspection of counsel, no less than the court. It is comparable to a proceeding in equity to cancel an instrument intended to be relied upon in a law action on the ground of fraud or forgery. Here instantly equity would compel its production for examination, aware that if the instrument is valid and genuine, no harm could come to respondents by its production. So with a criminal case. If this confession was obtained by proper methods, no harm could come to the government by its production in court and examination by judge and counsel. It is axiomatic that confessions are received with great caution because of the ease with which they are fabricated and the difficulty of exposing their fallacy (*Shelton v. State,* 42 So. 30, 144 Ala. 106; *Haynes v. State,* 27 So. 601 (Miss.)). This being so, the utmost liberality and scope should be allowed defendant in testing the genuineness of a confession, in advance of trial. The action of the judge in denying the request, with the slighting reference to it as a fishing expedition, came as an unexpected shock to defendants and a rebuff to their earnest effort to show the confession was obtained by methods condemned by law.

The discussion of the long and illegal detention of Mrs. Ah Fook Chang and her son without charge and opportunity to obtain bail and solely for the purpose of getting a confession, would not be complete without mention of the *Charles Hee Case* (*Charley Hee v.*

U. S., (C.C.A. 1) 19 Fed.(2d) 335). This is the case of a Chinese, resident of Boston, who claimed to be a citizen. He was arrested without warrant and imprisoned from Saturday until Monday while officers obtained a confession from him as basis for deportation proceedings. By a divided court, the First Circuit upheld the proceeding, but Judge Anderson, in a powerful dissenting opinion, branded the arrest, detention and interrogation of defendant as illegal and unconstitutional. He said:

> "If this were a criminal prosecution and if this evidence extorted from appellant while under unlawful restraint and duress had been seasonably objected to, a conviction, of course, would have to be reversed. * * *
>
> *"* * * Interrogation by a government official of one unlawfully in confinement is an illegal search and seizure, which cannot be made the basis of a finding in deportation proceedings. To seize the person and search the memory of a frightened victim is a far grosser invasion of personal liberty and disregard of due process of law than in the search for and the seizure of papers, even from a home or from an office as in the Gould Case."*

Certiorari was applied for and granted (275 U. S. 516, 48 Sup. Ct. 86). Thereafter, Mr. William D. Mitchell, Solicitor General, stipulated that the decision of the lower court should be reversed (276 U. S. 638, 48 Sup. Ct. 300).

This thought, that the Fourth Amendment protects a man against unreasonable search, not only as to his

chattels but also as to the secrets of his mind, is as old as the amendment itself. Said the Supreme Court in *U. S. v. Lefkowitz,* 285 U. S. 452, tracing historically the principles behind the amendment:

> "They apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life.
>
> " '* * * Any forcible and compulsory extraction of a man's own testimony, or of his private papers to be used as evidence to convict him of a crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other. And this court has always construed provisions of the constitution having regard to the principles upon which it was established. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions.' "

Courts will reject evidence obtained by an unreasonable search. To retain the evidence and merely condemn the method of securing it, would in effect reduce the fourth amendment to a rule of ethics. While courts hold that even a slight delay in charging a defendant renders his detention unlawful (5 C. J. 430), we are not prepared to say that a confession incidentally obtained while briefly and technically in unlawful restraint would be inadmissible, but we do assert that unreasonable wrongful detention, in character and duration, for the sole purpose of obtaining evidence against accused in the form of a confession, is inadmissible, for such detention for

such purpose is as violative of a man's constitutional right as the entry of his home and the search of his papers without warrant.

While, of course, confessions obtained voluntarily are not within the provisions of the Fifth Amendment, they must be voluntary in fact.

In *Zaing Sun Wan,* 266 U. S. 1, 45 Sup. Ct. 1, it was said:

> "In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or threat. *A confession is voluntary in law if, and only if, in fact, it was voluntarily made.*"

Purpuna v. U. S., (C. C. A. 4) 262 Fed. 473: In this case, defendant was held for twenty-four waking hours and questioned until he confessed and the court held that the confession was involuntarily obtained.

In *Davis v. U. S.,* (C. C. A. 9) 32 Fed.(2d) 860, defendant denied his guilt until taken to the morgue to view the body of the victims of the murder. The confession which followed was held involuntary.

In *Perrygo v. U. S.,* 2 Fed.(2d) 181, the defendant was questioned for more than an hour. The court took the view that even an hour's detention for questioning was more than the law sanctioned when the defendant was young and inexperienced. See, also, *Lewis v. U. S.,* (C. C. A. 9) 74 Fed.(2d) 173; *Brown v. U. S.,* 13 Fed.(2d) 298; *U. S. v. Lonardo,* 67 Fed.(2d) 883; *Murphy v. U. S.,* (C. C. A. 9) 285 Fed. 801 and *Fitter v. U. S.,* 258 Fed. 567.

4. THE COURT ERRED IN NOT EXCLUDING ROBERT CHANG'S PURPORTED CONFESSION.

What has been said with reference to the purported confession of Mrs. Ah Fook Chang applies with equal force to the purported confession of Robert Chang. This confession was admitted over objection and exception of defendant, who objected on the ground that it had been obtained from defendant while he was under illegal restraint and was not voluntarily given (R. p. 139).

5. CONFESSION ONLY EVIDENCE AGAINST PARTY MAKING IT.

It is elementary that an act or confession of a co-conspirator is binding on others in the conspiracy only when done and made when the conspiracy is pending and in furtherance of its object *(Brown v. U. S.,* 150 U. S. 93; *Wiborg v. U. S.,* 163 U. S. 632; *Clune v. U. S.,* 159 U. S. 590).

When an arrest terminates the consipracy, thereafter a confession made by one is no longer binding on his co-conspirators *(Graham v. U. S.,* (C. C. A. 8) 15 Fed.(2d) 740; *Minner v. U. S.,* (C. C. A. 10) 57 Fed.(2d) 506).

Under the amendments to the Constitution against compulsory self-incrimination (5th Amendment), a defendant, when arrested, has the right to hold his tongue. His silence under such circumstances is not an admission as it might be construed under some circumstances in a civil case *(Bilokumsky v. Todd,* 263

U. S. 149, 40 Sup. Ct. 54). The Constitution gives him the right to remain silent and he cannot be denied this right by merely availing himself of it. A person under arrest may stand his ground and hold his peace and his silence does not constitute evidence against him (*McCarthy v. U. S.*, (C. C. A. 6) 25 Fed.(2d) 298; see, also, *Rocchia v. U. S.*, 78 Fed.(2d) 966 at 972).

In this case the record does not disclose that Robert Chang even knew that Mrs. Ah Fook Chang had made a confession, or if so, what it contained (R. pp. 151-153) (*Yep v. U. S.*, (C. C. A. 10) 83 Fed.(2d) 41).

As we have shown, the court persisted in instructing the jury, over objection and exception of defendants, that the confession of one defendant could be considered as evidence against the other (R. pp. 151-152; 181-182). The court's refusal to limit the evidentiary effect of these confessions was clear error.

6. THE COURT ERRED IN DENYING MOTION OF DEFENDANTS THAT EVIDENCE OF MRS. CHANG GIVEN ON HEARING OF MOTION TO SUPPRESS BE READ TO THE JURY ON QUESTION OF VOLUNTARINESS OF CONFESSION.

In moving, as Mrs. Chang did, in advance of trial to suppress her confession, the effect of the court's ruling in admitting the confession was no more than to hold that it was prima facie admissible and, notwithstanding its admission, the jury was still free to give it such weight as it believed it was entitled to, considering all the evidence in the case, or reject it entirely.

> "When there is a conflict of evidence as to whether a confession is, or is not, voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if, upon the whole evidence, they are satisfied it was not the voluntary act of the defendant."
>
> *Wilson v. U. S.,* 162 U. S. 613.

See, also,

> *Peterson v. U. S.,* (C. C. A. 9) 297 Fed. 1002;
> *Gin Bok Sing,* (C. C. A. 9) 8 Fed.(2d) 976;
> *Lewis v. U. S.,* supra.

On the hearing to suppress this confession, sworn testimony had been taken from Mrs. Chang and Robert Chang (R. pp. 82-95) and the defendants offered in evidence this testimony for consideration of the jury (R. p. 158) which the court denied (R. p. 161). We respectfully submit that the court erred in denying this offer.

7. ERROR IN REFUSING DEFENDANTS' REQUESTED INSTRUCTIONS.

The court refused to give nine instructions requested by the defendants, all of which, in one way or another, concerned the confessions obtained from the defendants. It will be sufficient, for the purposes of this brief, to discuss six of these instructions separately.

The first instruction requested by defendants, as set forth in the assignment of errors, was as follows:

> "I instruct you, Gentlemen of the Jury, that there has been admitted in evidence what purports to be written confessions by the defendants herein.
>
> "In this connection, I instruct you that a confession, to be considered as evidence against a defendant in a criminal case, must be one freely and voluntarily made by such defendant. When we use the word 'voluntary' in this connection, we mean that the confession must have been made of defendant's free will and accord, without coercion, promise or inducement or by the method known as sweating. The word 'voluntary' essentially includes in its meaning the freedom of choice as well as the exercise of the defendant's will without constraint by any force or influence. If, in this case, you believe from the evidence and the facts surrounding the incarceration of these defendants that either of the purported confessions admitted in evidence herein was not voluntarily made, within the meaning of that word as defined in this instruction, or if you have a reasonable doubt on the point, you should totally disregard, in your deliberations, such confession."

This instruction correctly states the law (*Commonwealth v. McClanahan,* 155 S. W. 1131, 153 Ky. 412). Without this instruction the jury was left without "a yardstick by which they could measure the confessions" from the standpoint of their voluntary

character (R. p. 174). In *Wharton Criminal Evidence,* Vol. 2, page 1104, it is said:

> "* * * the remaining states adhere to the ruling that the question whether a confession has been voluntarily made is ultimately to be decided by the jury, where the evidence in that regard is conflicting. In all states where confessions have been admitted in evidence by the court, where there has been conflicting evidence on the question of involuntariness, *the defendant is entitled to an instruction in which the court explains to the jury the meaning of voluntariness.* * * *"

See *Davis v. U. S.,* (C. C. A. 9) 32 Fed.(2d) 860, and for cases somewhat analogous, see *People v. Sternberg,* 43 Pac. 201, 111 Cal. 11; *Roberts v. State,* 40 S. E. 297, 114 Ga. 450; *People v. Stewart,* 230 Pac. 221, 68 Cal. App. 621; *Commonwealth v. Ronello,* 96 Atl. 826, 251 Pa. 329; *Fletcher v. Commonwealth,* 275 S. W. 22, 210 Ky. 71; *State v. McDonie,* 109 S. E. 710, 89 W. Va. 185.

Instruction No. 2 requested by defendants was as follows:

> "I instruct you, Gentlemen of the Jury, that in considering whether or not the confession made by Mrs. Ah Fook Chang was voluntarily made within the meaning of this term as heretofore defined in these instructions, it is your right and duty to take into consideration the period, circumstances and duration of her arrest, confinement and detention and the fact that she had, previously to the making of said confession, made

> at least two other statements in which she denied all guilt and complicity in the matters and things set forth in the final purported confession which was obtained from her, as well as all other facts and circumstances surrounding the taking and making of said alleged confessions." (R. p. 176)

This instruction was a complement of the first and defendants were plainly entitled to it (*State v. Jordan,* 54 N. W. 63, 87 Ia. 86; *Commonwealth v. Brown,* 20 N. E. 458, 149 Mass. 35).

In *People v. Klyczek,* 138 N. E. 275, 307 Ill. 150, the court said:

> "The situation in which the plaintiff in error was placed and the circumstances surrounding him at the time were proper to be taken into consideration by the court in determining the competency of the confession, including his youth and inexperience, his character, his intelligence, his strength of intellect, his knowledge or ignorance, and the fact that he was detained in prison and was interrogated by the police who held him in custody. * * *
>
> "The question of admissibility is finally whether, considering all the circumstances of this particular case, they were such that the statement of the plaintiff in error might have been induced by their influence to make a false confession."

The defendants submitted to the court three instructions on illegal restraint and asked that at least one be given but all were refused. These instructions numbered 6, 7 and 8 (R. pp. 178-179) read as follows:

"INSTRUCTION No. 6.

"The court instructs the jury, that it was the duty of the officers who arrested defendants in this case, to have brought them before the United States Commissioner at Hilo, or local magistrate, without unnecessary delay, that they might speedily be advised of the accusation against them and be permitted enlargement on bail.

"I further instruct you, as a matter of law, that failure on the part of an arresting officer to bring an arrested person with reasonable dispatch before a commissioner or magistrate, for the purposes mentioned in this instruction, renders the detention and imprisonment of the arrested person unlawful."

"INSTRUCTION No. 7.

"I further instruct you, Gentlemen of the Jury, that an arresting officer has no legal right to hold an accused in jail without charge, for the purpose of investigating the crime he is believed to have had a part in, or to procure a confession from him. Detention for such purpose or purposes is illegal."

"INSTRUCTION No. 8.

"I further instruct you, Gentlemen of the Jury, that if you believe from the evidence that the defendants in this case were held in confinement without charge and without opportunity to make bail, for an unreasonable length of time, considering the availability of a United States Commissioner, then I instruct you as a matter of law

their detention and imprisonment was improper and illegal."

The question of illegal restraint, as we have shown, was very material in determining the voluntary character of the confessions.

In *People v. Vinci,* 129 N. E. 193 at 195, 295 Ill. 419, the court said:

> "In determining whether or not a confession was made voluntarily, it is proper to take into consideration the fact of unlawful restraint."

See, also, 16 *C. J.* 719.

There can no longer be any doubt that it was the duty of the officers making the arrest, promptly to take the defendants before the commissioner and their failure to do so made the detention illegal.

> "It is the duty of an officer after making an arrest, either with or without warrant, to take the prisoner within reasonable time, before a justice of the peace, magistrate or proper judicial officer having jurisdiction, in order that he may be examined and held, or dealt with as the case required. It is sometimes said that this must be done immediately, or forthwith, or without delay. these requirements mean no more than that it must be done promptly or within reasonable time and circumstances * * * but to detain the prisoner in custody longer than necessary *or for any purpose other than taking him before a magistrate is illegal."*
>
> 5 *C. J.* page 430.

The court was requested by defendants to give instruction No. 10, which it refused to do (R. p. 180). This instruction read as follows:

> "And I further instruct you, Gentlemen of the Jury, that the detention and imprisonment of an accused, without charge and solely for the purpose of obtaining a confession from him, renders a confession thus obtained invalid and inadmissible against him. A confession thus obtained is an invasion of defendant's rights under the Fourth, Fifth and Fourteenth Amendments of the Constitution. These Amendments shield and protect him, not only in the lawful enjoyment of his tangible possessions, but also in the possession of the secrets of his mind."

8. ERROR IN THE COURT'S INSTRUCTION TO THE JURY FOREMAN.

It will be recalled that while the jury was deliberating, the foreman appeared unannounced and unexpectedly in the judge's chambers and there had a communication with the judge respecting the case. The only persons present besides the judge were the attorneys; the clerk and court reporter being absent, it was necessary by affidavit certified as correct by the judge to bring this phase of the case into the record (R. pp. 181-183). The foreman stated the jury wished to be advised if the confession of one defendant could be considered as evidence against the other. Counsel for defendants requested the court to answer the question in the negative but the judge, over defendants' exception, refused to do this and

reiterated the ruling he had made in the trial: that is, that a confession made by one defendant in the case could be used as evidence against the other. The foreman retired and soon thereafter a verdict was returned. No one knows what the foreman told his fellow jurors and, of course, the whole proceeding was thoroughly irregular. In practical effect, it amounted to a secret communication between the judge and one of the jurors. From any standpoint this proceeding in the judge's chambers constituted reversible error (*Fillippon v. Albion Vein Slate Co.*, 250 U. S. 76, 39 Sup. Ct. 435; *Little v. U. S.*, (C. C. A. 10) 73 Fed.(2d) 861). Beside which the instruction itself is reversible error because, obviously, the confession signed by Mrs. Ah Fook Chang could not be considered against Robert Chang to whom it was never read and who, apparently, knew nothing of its contents (R. pp. 151-153).

9. DENIAL OF MOTION FOR NEW TRIAL.

All of the various errors relied on in this case by appellants were called to the trial court's attention in the motion for new trial (R. pp. 183-186), but without avail.

IV.

CONCLUSION.

The record in this case shows various reversible errors committed in the trial, leaving the appellate court with a freedom of choice, so to speak. Respectfully appellants urge the court to give primary consideration to the first assignment of error, which relates to the wrongful search and seizure of Robert Chang's room, for disposition of this point, favorable to the contention of appellants, would dispose of this case, once and for all.

Respectfully submitted,

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